UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Part 2

(Docket No. RM 96-6-001; Order No. 592-A)

INQUIRY CONCERNING THE COMMISSION'S MERGER POLICY UNDER THE FEDERAL POWER ACT

ORDER ON RECONSIDERATION

(Issued June 12, 1997)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order on Reconsideration.

SUMMARY: The Commission denies reconsideration of its Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger is Consistent With the Public Interest. In that Policy Statement, the Commission said that it will generally allow 60 days for comments on a completed merger application. In response to commenters who argue that 60 days will not be enough time to prepare substantial comments on some merger applications, the Commission notes that the Policy Statement establishes only a general policy, not a binding rule, and states that it will lengthen the comment period in specific cases when there is reason to do so.

FOR FURTHER INFORMATION CONTACT:

Jan Macpherson
Federal Energy Regulatory Commission
Office of the General Counsel
888 First Street, N.E.
Washington, D.C. 20426
(202) 208-0921

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the Federal Register, the Commission also provides all interested persons an opportunity to inspect or copy the contents of the document during normal business hours in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using a personal computer with a modem by dialing 202-208-1397 if dialing locally or 1-800-856-3920 if dialing long distance. To access CIPS, set your communications software to 19200, 14400, 12000, 9600, 7200, 4800, 2400 or 1200 bps, full duplex, no parity, 8 data bits and 1 stop bit. The full text of this order will be available on CIPS in ASCII and WordPerfect 6.1 format. CIPS user assistance is available at 202-208-2474.

CIPS is also available on the Internet through the Fed World system. Telnet software is required. To access CIPS via the Internet, point your browser to the URL address: http//www.fedworld.gov and select the "Go to the FedWorld Telnet Site" button. When your Telnet software connects you, log onto the FedWorld system, scroll down and select FedWorld by typing:

1 and at the command line then typing: /go FERC. FedWorld may also be accessed by Telnet at the address fedworld.gov.

Finally, the complete text on diskette in WordPerfect format may be purchased from the Commission's copy contractor, La Dorn Systems Corporation. La Dorn Systems Corporation is also located in the Public Reference Room at 888 First Street, N.E., Washington, D.C. 20426.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act	)))	Docket No. RM96-6-001

ORDER NO. 592-A

ORDER ON RECONSIDERATION

(Issued June 12, 1997)

Introduction

The Commission recently issued a Policy Statement updating and clarifying its procedures, criteria, and policies concerning public utility mergers. 1/ Among other things, we set forth procedures that are designed to allow our review of proposed mergers to proceed as efficiently as possible and avoid unnecessary delays, while ensuring that mergers are consistent with the public interest. This order denies reconsideration 2/

1/ Policy Statement Establishing Factors the Commission Will Consider in Evaluating Whether a Proposed Merger is Consistent With the Public Interest, Order No. 592, 61 FR 68595 (Dec. 30, 1996), FERC Stats. & Regs. ¶ 31,044 (1996) (Policy Statement).

2/ Policy statements are not subject to rehearing. See, e.g., Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, 75 FERC ¶ 61,026 (1996) (rehearing does not lie because policy statements are not directly reviewable; rather, review is available when policy is applied in specific case), citing American Gas Assoc. v. FERC, 888 F.2d 136, 151-2 (D.C. Cir. 1989) (policies are not ripe until applied in specific cases). However, we may, at our discretion, entertain reconsideration.

of our statement that we will generally allow 60 days for comments on a merger filing. We conclude that intervenors generally will be able to submit adequate filings within that period. We will lengthen (or shorten) the comment period on a case-by-case basis when there is reason to do so.

Background

In the Policy Statement, we adopted an analytic "screen" to aid in analyzing the effect of a proposed merger on competition. We explained what information an applicant should submit to allow us to apply the screen and thus to distinguish between those mergers that require a more detailed analysis, which may include a trial-type or a paper hearing, and those that clearly do not raise competitive concerns. Applicants are expected to make available to the public all data used in the screen analysis and other related data. If the screen analysis shows that the merger would not significantly increase market concentration and there are no interventions raising genuine issues of material fact that cannot be resolved based on the written record, we stated that we will not set the issue of the effect of a merger on competition for hearing.

In the Policy Statement, we found that the analytic screen would produce a "reliable, conservative analysis of the competitive effects of proposed mergers. However, it is not

infallible." 3/ Intervenors may, assuming their claims are substantial and specific, challenge the data used or the way the applicants conducted the analysis. They also may argue that the screen does not identify a particular market problem. Moreover, we noted that intervenors may wish to submit an alternative competitive analysis, accompanied by appropriate supporting data. Recognizing that "the need for more rigor in interventions could require additional efforts by potential intervenors," 4/ we stated that we would routinely allow 60 days for comments on merger filings. 5/

Arguments on Reconsideration

The Transmission Access Policy Study Group and the American Public Power Association (TAPS/APPA) filed a request for reconsideration 6/ in which they argue that 60 days may not be enough time to produce the kind of substantial interventions the Commission is expecting. They argue that if the Commission intends to rely on interventions as the "primary substantive basis (other than the self-serving data provided by the applicants)" for the Commission's decision, 60 days is not enough

---

3/ 61 FR at 68600, mimeo at 25.

4/ 61 FR At 68600, mimeo at 26.

5/ 61 FR At 68600, mimeo at 26.

6/ Filed January 17, 1997. The filing is styled as a request for rehearing, clarification, or reconsideration.

time. When applicants submit data to support their screen analysis, they naturally will select data that shows the merger in the best possible light, and will not reveal unfavorable data.

TAPS/APPA also criticize the data we suggested applicants submit to support their screen analyses. 7/ They argue that applicants themselves would never assess a potential merger based only on these data. For example:

> [t]he complete heat rates of various units . . . which change by the point of the output of the unit on the load curve, are not data which are available on EIA Form 860, and the historical fuel costs shown in FERC Form 423 are not likely to be the projected fuel costs which would be used by any executive determining whether to commit his or her company to a merger. [8/]

Unless the Commission decides in its planned rulemaking 9/ to

---

7/ Policy Statement, mimeo at Appendix B.

8/ TAPS/APPA reconsideration at 8 (footnote omitted).

9/ We noted in the Policy Statement that we will be issuing a Notice of Proposed Rulemaking to set forth more specific

(continued...)

require submission of all the data the company actually considered when making the real-life decision on the merger, the screen analysis may be misleading, according to TAPS/APPA.

TAPS/APPA compare this Commission's decision-making under section 203 of the Federal Power Act to that of agencies acting under the Hart-Scott-Rodino Act. 10/ They claim that the Commission will not be collecting a large part of the information that these agencies examine. For instance, the agencies require submission of all information the applicants considered when deciding whether to undertake the merger. Moreover, they can make a "second request" for even more information. TAPS/APPA argue that the Commission should require similar information. Specific information they say should be required includes, for example, transmission studies applicants have done that show various potential solutions to transmission constraints; different ways the applicants considered calculating available and total transmission capacity; information on vertical market power; and information on power alternatives that may not be truly available in the critical area because the power can be sold at a higher price elsewhere.

9/(...continued)
filing requirements and additional procedures. 61 FR at 68596, n.3.

10/ Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 18a (1994).

TAPS/APPA are particularly concerned that the 60-day period for interventions will not be adequate if intervenors will be expected to make a full-fledged case based on the limited information available. They point out that the applicant will have had much more time than 60 days to prepare the filing and argue that it is unfair to expect a complete, detailed response in 60 days. Finally, they suggest that the Commission allow the clock to be stopped while discovery goes forward and that intervenors be required to present their case 60 days after all necessary information is submitted. 11/

Discussion

At this time, we continue to believe that 60 days will generally be enough time for adequate interventions. Intervenors are free to argue that more time is needed in a particular case, and if we think more time is needed, we will extend the comment/intervention period. 12/ Moreover, the Policy Statement

---

11/ TAPS/APPA argue that the Commission should make it mandatory for merger applicants who want expedited treatment to serve potential intervenors with copies of the application by overnight delivery and electronic versions as well. Potential intervenors could be identified by having the applicants file a notice of intent to file even before they file the application itself; this would allow potential intervenors to identify themselves.

12/ We have stated our intention to shorten the comment period in certain types of cases that raise minimal concerns, Enova Corporation and Pacific Enterprises, 79 FERC ¶ 61,107 (1997), and will be willing to lengthen the comment period as well when a longer period is needed. See Pricing Policy

(continued...)

sets forth suggested data only; we are free to request additional data in a particular case, and have done so since the Policy Statement was issued. 13/ In our upcoming rulemaking proceeding, we will consider arguments as to what information should be required for mergers, as well as arguments as to filing deadlines and other procedural matters, since it is in that proceeding that we will propose a binding rule. 14/

TAPS/APPA also ask that in light of the dynamic nature of today's industry, the Commission make it clear that we will not ignore factual changes that occur while an application is pending. We do not intend to ignore significant factual changes.

The Commission orders:

The motion for reconsideration or clarification is hereby denied in part and granted in part as set forth in the body of this order.

By the Commission.

12/(...continued)
for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines, Order Denying Rehearing, 75 FERC ¶ 61,105 at 61,344 (1996) (issues raised in requests for "rehearing" of Policy Statement are case-specific in nature and should be addressed in individual cases).

13/ Letter order of April 3, 1997 from Debbie Clark, Chief Accountant, Federal Energy Regulatory Commission to Ohio Edison Company, et al. in Docket No. EC97-5-000.

14/ TAPS/APPA may raise in the rulemaking proceeding their arguments that it should be mandatory for applicants who want expedited treatment to make special service to potential intervenors.

(S E A L)

Lois D. Cashell,
Secretary.